(6)

No. 98-387

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

GREATER NEW ORLEANS BROADCASTING ASS'N, *et al.*,
Petitioners,

v.

UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF engages in litigation and the administrative process in a variety of areas. WLF devotes a substantial portion of its resources to promoting commercial free speech rights. To that end, WLF has appeared before this Court and other courts in numerous cases dealing with commercial speech issues, including, most recently, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); and *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).

SUMMARY OF ARGUMENT

Invoking this Court's precedents, the court below accepted as legitimate the government's use of a restriction on commercial speech "to control demand for the activity" being advertised—commercial gambling. 149 F.3d at 340. In its earliest commercial speech decisions, this Court indicated that restricting commercial speech for such a manipulative purpose was impermissible. In subsequent decisions, however, the Court has appeared to accept, at least tacitly, the use of commercial speech restrictions for that purpose. But the central function of the First Amendment is to prevent the government from restricting speech to shape choice. The First Amendment therefore does not permit the government to suppress truthful

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amicus* and its counsel, contributed monetarily to the submission of this brief. Letters of consent to the filing of this brief from counsel for the parties have been filed with the Clerk of this Court.

advertising for a lawful product or service for the purpose of dampening consumer demand. The Court should make unmistakably clear, as Justice Thomas urged in his concurring opinion in *44 Liquormart*, that the government may *not* restrict speech to influence choice—either in the voting booth *or* in the marketplace. As long as the speech is truthful and the choice is lawful, shielding the public from commercial information the government fears it will "mishandle" is not even a legitimate governmental interest, much less a "substantial" one, for purposes of the second prong of the *Central Hudson* test.

Relying on this Court's decisions, the court below also treated as self-evident—as something that can simply be "postulated" and requires no proof (149 F.3d at 340 n.14)—that the advertising the government seeks to suppress in this case stimulates the demand the government seeks to dampen. This, however, is a crucial question of fact, the answer to which cannot be presumed without rendering the third prong of the *Central Hudson* test purely pro forma. Does broadcast casino advertising stimulate people to gamble who would not otherwise gamble? Or does it instead merely influence people who already gamble to patronize one casino rather than another, or to place their bets at casinos rather than racetracks? If the former, restricting broadcast casino advertising may reduce gambling. If the latter, it may not. The Court should clarify that (1) the burden rests with the government to demonstrate that the advertising it seeks to suppress *in fact* stimulates the demand it seeks to dampen, (2) those seeking to overturn a commercial speech restriction are entitled to challenge the government's showing with contrary evidence, and (3) the court must carefully scrutinize the record and make an

independent judgment on this crucial factual issue based on all the evidence presented.

Finally, the court below rejected the central teaching of *44 Liquormart*—that, under the fourth prong of the *Central Hudson* test, the government may not restrict commercial speech as a means of regulating behavior if non-speech-restrictive options are available to serve that purpose; and the court incorrectly implied that the burden is on the party challenging the speech restriction to demonstrate the efficacy of non-speech-restrictive alternatives. 149 F.3d at 340. Seven Members of this Court agreed in *44 Liquormart* that, to satisfy *Central Hudson*'s fourth prong, the government must demonstrate that it could not achieve its purposes by means of non-speech-restrictive alternatives. In this case, any number of non-speech restrictive alternatives are available to the government to discourage public participation in commercial gambling. The Court should reemphasize that restricting speech is a weapon of last resort, not just one more way of getting at a perceived social problem.

ARGUMENT

I. THE FIRST AMENDMENT PROHIBITS THE GOVERNMENT FROM RESTRICTING TRUTHFUL ADVERTISING FOR A LAWFUL PRODUCT OR SERVICE TO DAMPEN CONSUMER DEMAND

Under the second prong of the *Central Hudson* test, commercial speech may be restricted only in the service of a "substantial" governmental interest. The Court should make clear that the government has no legitimate

interest—much less a "substantial" one—in depriving consumers of information "so as to thwart what would otherwise be their [lawful] choices in the marketplace." *44 Liquormart*, 517 U.S. at 522-23 (Thomas, J., concurring). Any restriction on commercial speech that the government attempts to justify as a means of manipulating lawful private choices should be held to fail the second prong of the *Central Hudson* test.

When the Court announced in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), that the First Amendment protects truthful speech proposing lawful commercial transactions, it stressed that the First Amendment precludes the government from suppressing such speech out of a concern that consumers, once informed, will fail to perceive their own best interests:

> "There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them * * *. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Id.* at 770.

This Court subsequently reiterated that truthful commercial speech may not be suppressed based on the government's paternalistic desire to control lawful adult behavior. In *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 96-97 (1977), the Court held that the "basic" constitutional defect of an ordinance seeking to prevent

white flight by forbidding the posting of "For Sales" and "Sold" signs in residential neighborhoods was its attempt to manipulate the choices of the township's residents by preventing them from obtaining information. Similarly, in *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977), the Court held a lawyer advertising restriction unconstitutional because, among other things, it rested on "the benefits of public ignorance."

In subsequent cases, however, the Court has nevertheless appeared to accept—or, at least, has not questioned—the legitimacy of using speech restrictions to control private choice in the marketplace. In *Central Hudson*, itself, the Court invalidated a restriction on promotional advertising by utilities imposed to dampen demand for electricity—not because the Court considered the use of a speech restriction for that purpose impermissible, but because the Court found the particular restriction more extensive than necessary. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). Three Justices, concurring in the judgment, apparently would have held the state's use of the speech restriction to dampen demand impermissible. *See id.* at 573 (Blackmun, J., joined by Brennan, J., concurring); *id.* at 579 (Stevens, J., joined by Brennan, J., concurring).

Similarly, in *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), the Court sustained a Puerto Rico statute banning casino advertising directed to local residents that the Commonwealth sought to justify as a means of reducing demand for casino gambling by such persons. Three Justices, writing in dissent, assailed the majority's premise that "Puerto Rico constitutionally may prevent its residents from obtaining truthful commercial speech concerning otherwise lawful activity because of the

effect it fears this information will have." *Id.* at 358 (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting). Justice Stevens, also writing in dissent, questioned whether the Commonwealth's concerns about the consequences of permitting "too much speech" were well founded. *Id.* at 360 n.1 (Stevens, J., joined by Marshall & Blackmun, JJ., dissenting).

Again, in *Rubin v. Coors Brewing Co,* 514 U.S. 476 (1995), the Court invalidated a federal statute prohibiting malt beverage manufacturers from disseminating information on their product labels that the government feared would stimulate consumption—not because the Court found the government's manipulative purpose problematic, but because the Court concluded that statute could not achieve its purpose.

And in *44 Liquormart*, the Court invalidated two Rhode Island laws that sought to promote temperance by restricting advertising, but only Justice Thomas found that use of a speech restriction to be impermissible. *See* 517 U.S. at 518 (concurring opinion). Justice Stevens and three other Justices also found the government's use of censorship to influence consumer behavior troubling from a First Amendment standpoint. *See id.* at 495-500 (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.); *id.* at 501-04 (Stevens, J., joined by Kennedy & Ginsburg, JJ.); *see also id.* at 509 (Stevens, J., joined by Kennedy, Thomas & Ginsburg, JJ.) (noting the Court's "long hostility to commercial speech regulation of this type"). But the plurality expressed its discomfort in a most curious way, *allowing* the government to restrict speech to influence choice, as long as the government can demonstrate that the

results achieved will be "significant." *Id.* at 504-07 (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.).[2]

Justice Stevens and the Justices who joined him in *44 Liquormart* rightly found the government's use of censorship to influence consumer behavior troubling from a First Amendment standpoint. But the better solution is the one urged by Justice Thomas—to hold such a use of censorship to be "per se illegitimate." 517 U.S. at 518.

Restricting commercial speech to influence consumer behavior "strikes at the heart of the First Amendment." *Central Hudson*, 447 U.S. at 574 (Blackmun, J., concurring). Restricting commercial speech to "control" consumer behavior "strikes at the heart of the First Amendment" because it presumes that people cannot be trusted to use information wisely. "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Virginia State Board. of Pharmacy*, 425 U.S. at 770. Equally problematic, as Justice Stevens noted in *44 Liquormart*, curtailing access to truthful information—for any purpose—may "'screen from public view the underlying governmental policy,'" *id.* at 500 (citation omitted), and "impede debate over central issues of public policy," *id.* at 503 (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.).

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[2] Of these four cases involving speech restrictions imposed to dampen demand for a product or service, only in *Posadas*—where the speech restriction was upheld—was the legitimacy of the government's purpose necessary to the outcome of the case.

These flaws cannot be cured or mitigated, as the *44 Liquormart* plurality seemed to suppose, by requiring the government to make a heightened showing of efficacy under the third prong of the *Central Hudson* test. *See* 517 U.S. at 504-08. To the contrary, as Justice Thomas observed, the plurality's approach "seems to imply that if the State had been more successful at keeping consumers ignorant and thereby decreasing their consumption, then the restriction might have been upheld." *Id.* at 523 (concurring opinion). Nor do these flaws turn on whether a speech restriction can be characterized as a "complete" or "blanket" ban. If the First Amendment prevents the government from restricting speech to influence choice, it cannot be an answer that the government has sought to do so by restricting speech "only a little bit." Similarly, even if a speech restriction cannot be characterized as a "complete" or "blanket" ban, if the restriction is significant enough to affect behavior, it must be significant enough to impede debate over public policy.

For these reasons, the Court should make clear that the government may not restrict commercial speech to influence consumer choice, as long as the speech is truthful and the choice is lawful. Under the First Amendment, such a purpose is forbidden.

II. THE FIRST AMENDMENT REQUIRES THE GOVERNMENT TO DEMONSTRATE THAT THE ADVERTISING IT SEEKS TO RESTRICT STIMULATES THE DEMAND IT SEEKS TO DAMPEN

In applying the third prong of the *Central Hudson* test, the court below assumed that prohibiting broadcast casino advertising would dampen demand because, relying on language in this Court's decisions, it simply assumed that such

advertising stimulates demand for gambling. The court did not consider itself bound to determine, as a factual matter, whether the advertising that Section 1304 prohibits in fact stimulates the demand the government seeks to dampen. Instead, it treated the proposition as something that could be "postulated." 149 F.3d at 340 n.14. *See also id.* at 340 (flatly asserting that "regulation of promotional advertising directly influences consumer demand").

In dispensing with the need to make the government shoulder its burden of demonstrating that Section 1304 satisfies the third prong of *Central Hudson*, the court pointed to what it characterized as "numerous assertions by [this Court] that the purpose and effect of advertising are to increase consumer demand and, conversely, that limits on advertising will dampen such demand." 149 F.3d at 336 (citing *United States v. Edge Broad. Co.*, 509 U.S. 418, 434 (1993); *Posadas*, 478 U.S. at 342; and *Central Hudson*, 447 U.S. at 569).[3] Further citing *Posadas*, 478 U.S. at 342, the court also stated: "That the broadcast advertising ban in § 1304 directly advances the government's policies must be evident from the casinos' vigorous pursuit of litigation to overturn it." 149 F.3d at 338.

When the government seeks to restrict advertising to reduce consumer demand, this Court's decisions do not relieve the government of its burden of proof under the third prong of *Central Hudson* by licensing courts to "postulate"

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[3] *See also id.* at 337 (referring to "the series of decisions [by this Court] that has found a commonsense connection between promotional advertising and the stimulation of consumer demand for the products advertised") (citing *Central Hudson*, 447 U.S. at 569).

that the advertising the government seeks to restrict stimulates the demand it seeks to dampen--or, correspondingly, that restricting that advertising will in fact dampen that demand. If courts had such license, third-prong analysis would become entirely pro forma whenever the government undertakes to restrict advertising to dampen demand, and the broadest advertising restrictions would become the easiest to justify. In that event, "the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 843-44 (1978).[4]

Central Hudson and its progeny stand for no such principle. In *Central Hudson*, the New York State Public Service Commission sought to reduce consumer demand for electricity by prohibiting the utility from promoting new goods and services (such as heat pumps) that might increase consumer use of electricity. The utility held a monopoly over the provision of electricity in its area of service, and

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[4] Ironically, the court below appeared to believe that the price advertising ban challenged in *44 Liquormart* was more difficult to justify under the third prong of the *Central Hudson* test precisely because it did not ban *more* speech. *See* 149 F.3d at 340. Instead of attempting to influence consumers directly by banning promotional advertising generally—which the court below plainly would have found to satisfy the third prong—Rhode Island prohibited only one piece of factual information from being communicated to consumers, in the hope that the result of this focused restriction would be to keep alcohol prices high, thereby discouraging consumption.

there was no dispute that the commercial speech in question was designed to stimulate overall use of electricity.

Here, it is not necessarily the case that the advertising the government seeks to restrict in fact operates to stimulate gambling overall. Specifically, the advertising the government seeks to restrict may operate not to stimulate people to gamble who would not otherwise gamble, or to stimulate people who already gamble to gamble more, but instead may operate merely to move people who gamble from one casino to another, or from one *form* of gambling to another. These are quintessential fact questions on which the government must be to required make a factual showing, including overcoming contrary evidence, to meet its burden under the third prong that its advertising restriction "will in fact" reduce gambling. *Edenfield v. Fane*, 507 U.S. 761, 771 (1993).

In *Posadas*, the Court elevated the "commonsense connection" found by the Court in *Central Hudson* to what amounted to an irrebuttable presumption. In deferring to the legislature's "belief" that casino advertising to local residents "would serve to increase the demand for the product advertised"—without requiring a factual showing by the Commonwealth, and without conducting a searching inquiry of its own—the Court not only departed significantly from prior precedent, but sowed the seeds of future confusion. *Edge* then relied on *Posadas* for the proposition that the Government could "legislate[ ] on the premise that the advertising of gambling serves to increase the demand for the advertised product," notwithstanding the absence, as in *Posadas*, of any factual predicate for that conclusion in the particular case. *See* 509 U.S. at 434.

In sharp contrast to *Posadas* and *Edge* is the long line of cases following *Central Hudson* in which the Court has reiterated its holding that the "intuitive" belief that suppression of speech will further the government's ends cannot substitute for an adequate factual record, particularly where the factual basis for that belief has been put in issue. In *Edenfield v. Fane*, 507 U.S. 761, 770 (1993), the Court emphasized that the third prong of the *Central Hudson* test is "critical," and "is not satisfied by mere speculation or conjecture." The government must offer evidence sufficient to "demonstrate that the harms it recites are real, and that its restriction will in fact alleviate them to a material degree." *Id.* at 770-71 (citing *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 648-49 (1985)). *Zauderer* rejected the State's arguments that "amount to little more than unsupported assertions; nowhere does the State cite any evidence or authority of any kind for its contention[s]," and the Court made clear that the government must demonstrate the "factual necessity" for its speech restrictions by presenting evidentiary support in the judicial proceeding relating to the factual basis for, and the operation of, the commercial speech restriction. *Id.* at 649-57; *see also Rubin*, 514 U.S. at 489-90. "[L]egislative findings" by a governmental body simply "do[ ] not foreclose" the "independent judgment [of the courts] of the facts bearing on an issue of constitutional law." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 666 (1994); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (court must consider whether "the evidence adduced by the [government] is sufficient" after "scouring the record" before the court).

In *44 Liquormart*, the Court disavowed the deferential approach to reviewing commercial speech restrictions that

Posadas had signaled, and reiterated that "speculation or conjecture" are "an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest" when "the State takes aim at accurate commercial information for paternalistic ends." 517 U.S. at 507 (Stevens, J., joined by Kennedy, Thomas, & Ginsburg, JJ.) (citing *Edenfield*, 507 U.S. at 770)); *see also id. at* 531-32 (O'Connor, J., joined by Rehnquist, C.J., Souter & Breyer, JJ., concurring). In doing so, the Court returned to the fundamental principles embodied in *Central Hudson* and its progeny.

The confusion engendered by *Posadas* remains, however, as the court below demonstrated by holding that "*44 Liquormart* does not disturb the series of decisions that has found a commonsense connection between promotional advertising and the stimulation of consumer demand for the products advertised." 149 F.3d at 337. *Posadas, Edge*, and *Central Hudson*, itself, have been and *continue* to be cited by the lower federal courts as a basis for relieving the government of its burden of proof under the third prong of *Central Hudson*—even in the teeth of strong record evidence refuting the claimed link between advertising and demand and demonstrating that the purpose and effect of the advertising the government seeks to restrict are to increase one firm's share of the market at the expense of its competitors, rather than to stimulate demand among those who would not otherwise purchase *any* brand of the advertised product. [5]

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[5] *See, e.g., Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 747-50 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984)

(continued...)

(...continued)
(rejecting expert testimony that advertising merely affected brand loyalty and market share in favor of "the judicial notice approach taken in *Central Hudson*" that "sufficient reason exists to believe that advertising and consumption are linked to justify the ban, whether or not 'concrete scientific evidence' exists to that effect"); *Penn Adver. of Baltimore, Inc. v. City of Baltimore*, 862 F. Supp. 1402, 1410 (D. Md. 1994) (accepting "judicially-recognized proposition that advertising increases consumption"), *aff'd*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997); *Anheuser-Busch, Inc. v. City of Baltimore*, 855 F. Supp. 811, 818 (D. Md. 1994) (relying on the "Supreme Court's continued deference to a legislative judgment that advertising increases consumption" in rejecting evidence of record refuting connection between advertising and demand and showing that purpose and effect of advertising was to increase market share rather than to increase demand); *aff'd*, 101 F.3d 325 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997); *Lindsey v. Tacoma-Pierce County Health Dept.*, 8 F. Supp.2d 1225, 1231 (W.D. Wash. 1998) (citing *Central Hudson* and *Posadas* for the proposition that the court can take judicial notice of the fact "that advertising increases sales" despite evidence of record that consumption was actually higher in certain areas with an advertising ban); *Missouri Retailers Assoc. v. City of St. Louis*, No. 4:98CV1514 ERW, slip op. at 36-37 (E.D. Mo. Dec. 10, 1998) (relying on presumption of a connection between advertising and demand despite expert testimony that advertising is designed to increase market share and that restricting advertising would not decrease demand); *Aimes Publications v. United States Postal Service*, 1988 WL 19618 (D.D.C. 1988) (citing *Posadas* in support of "undisputed fact" that advertisements encourage participation in lotteries); *Association of Charitable Games of Mo. v. Missouri Gaming Comm'n*, 1998 WL 602050, *9 (W.D. Mo. 1998) (relying on *Edge* in support of proposition that "the purpose and effect of advertising are to increase consumer demand," but striking advertising regulation at issue under *44 Liquormart*
(continued...)

Reliance by the lower courts on the "presumption" supposedly derived from *Central Hudson* concerning the link between advertising and consumption, and the efficacy of advertising restrictions as a means of reducing demand, is in fact fundamentally inconsistent with the holding of *Central Hudson* and meaningful First Amendment protection for commercial speech. If third-prong review is to have any meaning when the government seeks to restrict advertising to dampen consumer demand, the government must be required to demonstrate by evidence that the advertising it seeks to restrict in fact stimulates the demand it seeks to dampen, and that restricting that advertising will in fact dampen that demand in a direct and material way. Those challenging an advertising restriction must be allowed to rebut the government's evidence and to offer contrary evidence of their own, and the reviewing court must then conduct a searching review of the record and make its own independent judgment of what the evidence shows.

(...continued)
because alternative non-speech-restrictive means were available to achieve State's purpose); *Eller Media Co. v. City of Oakland*, No. C98-2237 FMS, slip op. 11 (N.D. Cal. Jan. 15. 1999) ("The Court appears to require a lesser third-prong showing in cases where the means-end relationship is intuitive"); *id.* at 13-14 ("By now, the correlation between advertising and general consumption is well established. * * * Nothing in *44 Liquormart* or the cases leading up to it requires a court-mediated 'battle of the experts' to confirm matters that fall squarely within the realm of common sense.").

III. THE GOVERNMENT MAY NOT RESTRICT SPEECH TO ACHIEVE NON-SPEECH-RELATED ENDS EXCEPT AS A LAST RESORT

Applying the fourth prong of *Central Hudson*, the Court in *44 Liquormart* made it clear that the government may not restrict commercial speech *at all* if non-speech restrictive alternatives are available to serve the government's interest. The court below refused to recognize this teaching.

The Court in *44 Liquormart* struck down two Rhode Island laws that prohibited the advertising of retail prices of alcohol beverages anywhere other than at the point of purchase. The asserted purpose of the price-advertising ban was to discourage alcohol consumption. Seven Justices concluded that the advertising ban failed the fourth prong of *Central Hudson* because the State could have pursued its goal through "alternative forms of regulation that would not involve any restriction on speech." 517 U.S. at 507 (Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.); *id.* at 528-30 (O'Connor, J., joined by Rehnquist, C.J., and Souter & Breyer, JJ., concurring in the judgment). *See also id.* at 524-25 (Thomas, J., concurring in the judgment).

As Justice Stevens observed in his opinion:

> "[A]ttempts to regulate speech are more dangerous than attempts to regulate conduct. That presumption accords with the essential role that the free flow of information plays in a democratic society. As a result, the First Amendment directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another

> means that the government may use to achieve its ends." *Id.* at 511.

Justice Stevens explained why "[t]he State * * * cannot satisfy the requirement that its restriction on speech be no more extensive than necessary":

> "It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance. As the State's own expert conceded, higher prices could be maintained either by direct regulation or by increased taxation. * * * Per capita purchases could be limited as is the case with prescription drugs. Even educational campaigns focused on the problems of excessive, or even moderate, drinking might prove to be more effective.
>
> "As a result, even under the less than strict standard that generally applies in commercial speech cases, the State has failed to establish a 'reasonable fit' between its abridgment of speech and its temperance goal." *Id.* at 507.

Justice O'Connor made essentially the same point:

> "The availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny.

* * *

"The fit between Rhode Island's method and [its temperance] goal is not reasonable. If the target is simply higher prices generally to discourage consumption, the regulation imposes too great, and unnecessary, a prohibition on speech in order to achieve it. The State has other methods at its disposal—methods that would more directly accomplish this stated goal without intruding on sellers' ability to provide truthful, nonmisleading information to customers. * * * A tax, for example, is not normally very difficult to administer and would have a far more certain and direct effect on prices, without any restriction on speech. The principal opinion [by Justice Stevens] suggests further alternatives, such as limiting per capita purchases or conducting an educational campaign about the dangers of alcohol consumption. The ready availability of such alternatives— at least some of which would far more effectively achieve Rhode Island's only professed goal, at comparatively small additional administrative cost—demonstrates that the fit between ends and means is not narrowly tailored." *Id.* at 529-30 (citations omitted); *see also id.* at 524-25 (Thomas, J., concurring).

In sum, when the government can advance its goal through "direct regulation" of conduct or other non-speech-restrictive means, *44 Liquormart* teaches that the government may not pursue its goal by restricting otherwise lawful speech.

The court below sought to avoid this teaching, offering five reasons why it believed that *44 Liquormart* does not compel the government to pursue non-speech-restrictive

options in lieu of a speech restriction in this case. None of those reasons is persuasive.

First, the court below implied that the teaching of *44 Liquormart* is inapplicable if the speech restriction in question is not a "blanket" advertising ban but, as here, merely restricts advertising in a single medium. 149 F.3d at 340. Nothing in *44 Liquormart* supports such a distinction. The essence of the Court's reasoning in *44 Liquormart* is that speech restrictions are constitutionally disfavored and that non-speech-restrictive alternatives must be pursued whenever possible.[6]

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[6] The court's attempt to analogize Section 1304 to a "time, place, or manner" regulation (149 F.3d at 340) will not fly. In *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), the Court held that an ordinance banning "For Sale" and "Sold" signs on front lawns was not a "time, place, or manner" restriction because the ordinance applied to signs "based on their content." "That the proscription applies only to one mode of communication * * * does not transform this into a 'time, place, or manner' case." *Id.* at 94. Similarly, in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), invalidating a federal law prohibiting the mailing of unsolicited contraceptive advertisements, the Court stated that the statute in question could not be characterized as a "time, place, or manner" restriction "in light of [its] content-based prohibition." 463 U.S. at 69. Finally, in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), the Court held that, because the challenged newsrack ordinance was neither content-neutral nor narrowly tailored, it could not be justified as a legitimate time, place, or manner restriction, *regardless* of whether it left open ample alternative channels of communication. *See* 567 U.S. at 929.

Second, the court below suggested that *44 Liquormart* does not apply to an advertising restriction that "directly influences consumer demand, as compared with the indirect market effect criticized in *44 Liquormart*." 149 F.3d at 340. This mixes apples and oranges. The price advertising ban at issue in *44 Liquormart* was held to violate the fourth prong of the *Central Hudson* test not because it achieved its purpose indirectly but because alternatives were available to achieve the same purpose without restricting speech at all.

Third, the court below suggested that *44 Liquormart* does not require the government to pursue non-speech-restrictive options in lieu of speech restrictions if the efficacy of the non-speech-restrictive options is "purely hypothetical." 149 F.3d at 340. This incorrectly places on the party challenging a speech restriction the burden of demonstrating its invalidity, when the rule is that the "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger*, 463 U.S. at 71 n.20.

Fourth, the court below appeared to say that *44 Liquormart* does not require the government to pursue non-speech-restrictive alternatives when those alternatives would have to "compete" with speech promoting activities the government seeks to discourage. 149 F.3d at 340. Apart from having no support in *44 Liquormart*, the fact that a federal appeals court believes that truthful speech can be suppressed to make it easier for the government to implement its policies is startling, to say the least.

Fifth, the court below concluded that banning casino advertising even in states where casino gaming is legal is a "narrowly tailored" means of reinforcing the policies of non-

gambling states. 149 F.3d at 340. With respect, this is mere assertion, and it is incorrect.[7] In addition to banning casino advertising in states where casino gambling is illegal, Congress could, for example, provide federal support to law-enforcement authorities combating illegal gambling in non-gambling states, and could assist the non-gambling states in the dissemination of messages admonishing against participating in such gambling. A law cannot be considered "narrowly tailored" that prohibits advertising for an activity that is legal in the jurisdiction where the advertising originates, to consumers who may lawfully engage in that activity, on the ground that people in jurisdictions where the activity is unlawful may overhear it.

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[7] The court, again improperly shifting the constitutional burden, penalized the broadcasters for not identifying any non-speech-related alternatives to Section 1304 that would assist anti-gambling states. *Id.*

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, and the Court should reinforce the First Amendment's protection of commercial speech as discussed herein.

Respectfully submitted,

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